RECORD AND BRIEF

No. 16-529

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IN THE

Supreme Court of the United States

CHARLES R. KOKESH,

Petitioner,

v.

SECURITIES AND EXCHANGE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR MARK CUBAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Mark Cuban is a successful businessman and investor who defeated an attempt by the U.S. Securities and Exchange Commission (the "SEC") to sanction him as an "insider trader" based on an incorrect legal theory and defective facts. As a first-hand witness to and victim of SEC overreach, Mr. Cuban has an interest in supporting Petitioners' appeal in this case, and in particular demonstrating that Congress has never given to the SEC the power it has attempted to arrogate to itself—the power to obtain draconian remedies labelled "disgorgement" that are unbounded by statutes of limitations, governing statutes, or this Court's binding precedents.

According to its website, "[t]he mission of the U.S. Securities and Exchange Commission is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."[2] When the SEC usurps power that has not been expressly delegated to it by Congress, capital formation is impeded because market participants do not have clear rules for understanding their investment risks. Put differently, investment risk from arbitrary securities law enforcement is no less a threat to capital formation than investment risk resulting from lax enforcement; they are two sides of the same coin.

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1. Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus curiae* or his counsel made a monetary contribution intended to fund the preparation or submission of this brief. Both parties have consented to the filing of this brief.

2. *What We Do*, Sec. & Exch. Comm'n, http://www.sec.gov/about/whatwedo.shtml (last visited Mar. 2, 2017).

As a businessman who has faced down a misguided and defective SEC enforcement action, Mr. Cuban has an abiding interest in challenging the SEC when it takes positions unmoored from governing law and precedent. Here, the SEC has done exactly that in claiming that it can obtain as "disgorgement" a money judgment against defendants, plus crippling prejudgment interest, without regard to the time period that has passed between the time of the alleged violation and the time the SEC chose to bring its case, and also without regard to whether the SEC has satisfied the established requirements of equity jurisprudence for obtaining equitable relief.

SUMMARY OF ARGUMENT

The question presented in this case is whether "the five-year statute of limitations in 28 U.S.C. § 2462 appl[ies] to claims for 'disgorgement.'" However, the governing securities statutes do not provide for any federal court remedy of "disgorgement." Rather, they permit courts to order a "civil penalty" subject to various limitations, and "equitable relief that may be appropriate or necessary for the benefit of investors." *See* 15 U.S.C. § 78u(d)(3) (providing for civil monetary penalties for securities law violations)[3]; 15 U.S.C. § 78u(d)(5) (providing for equitable relief for parallel securities law violations). The federal

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3. *See also* Securities Act of 1933 § 20(d), 15 U.S.C. § 77t(d) (same); Investment Advisors Act of 1940 § 209(e), 15 U.S.C. § 80b-9(e) (same); Investment Company Act of 1940 § 43(e), 15 U.S.C. § 80a-41(e) (same). Note, in *SEC v. Kokesh*, the cited authority for the civil penalties was under the Securities Exchange Act, Investment Advisers Act, and Investment Company Act. *SEC v. Kokesh*, No. 09-cv-1021 SMV/LAM, 2015 WL 11142470, *11 (D.N.M. Mar. 30, 2015).

securities laws do not permit the SEC to obtain monetary relief unless it fits into one of those two categories of remedies. If "disgorgement" describes a civil penalty, the Section 2462 statute of limitations applies, as all sides here agree. If "disgorgement" in this case instead describes true "equitable relief," then this Court is called upon to determine whether that relief is a "forfeiture" under Section 2462. In other words, a necessary predicate to analyzing the question presented is determining whether the remedy sought in a particular case under the label of "disgorgement" is a "civil penalty" or "equitable relief." So far, the SEC and various lower court decisions have all sidestepped addressing this issue head-on or have approached the issue in a manner unconstrained by the governing statutory language, and in disregard of this Court's binding precedent in *Great-West Life & Annuity Insurance Company. v. Knudson*, 534 U.S. 204 (2002), which defined the term "equitable relief" as it appears in the United States Code and explained its meaning. *See, e.g.*, *FTC v. Bronson Partners, LLC*, 654 F.3d. 359, 369-375 (2d Cir. 2011) (post-*Great-West* decision substantively relying on pre-*Great-West* Second Circuit precedent).

Here, it appears that most, if not all, of the remedy ordered falls outside of the established limits of "equitable relief," since it goes beyond an order requiring the turnover of specifically identified property that the defendant obtained by wrongdoing. *See Great-West*, 534 U.S. at 213 (equitable relief is available only for the return of "money or property identified as belonging in good conscience to the plaintiff [that] could clearly be traced to particular funds or property in the defendant's possession" (citations omitted)). Thus, the remedy the SEC sought here is not,

in fact, "equitable relief." Moreover, the remedy also falls outside of the confines of the applicable "equitable relief" statute because it constitutes a money judgment in favor of the U.S. Treasury, not equitable relief "for the benefit of investors." *See* 15 U.S.C. § 78u(d)(5). Accordingly, the only permissible statutory basis for the order is that providing for civil penalties, which the SEC concedes is subject to the five-year statute of limitations established in Section 2462.

If any part of the relief requested here falls within the established and limited meaning of "equitable relief" as interpreted in *Great-West* and other decisions, then the answer to the question presented lies in an analysis of whether an order requiring the turn-over of specifically identified property constitutes a "forfeiture" under Section 2462. The Petitioner has argued persuasively that it does. But even if it did not, where "equitable relief" is properly understood to describe only an order regarding specifically identified property, not only would the equitable defense of laches apply to a stale claim, but also the character of the relief itself naturally would tend to eliminate stale claims both as a matter of fact and of proof—as time passes, the likelihood that a defendant would still hold tainted property, or that evidence would exist to permit the SEC to prove direct tracing of ill-gotten assets, would diminish.

ARGUMENT

I. THE OPERATIVE STATUTES GOVERN THE RELIEF THE SEC MAY SEEK AND FEDERAL DISTRICT COURTS CAN ORDER.

The SEC is authorized by Congress to seek and federal courts are authorized to grant monetary relief pursuant to statutory provisions authorizing the imposition of *money penalties, see, e.g.*, 15 U.S.C. § 78u(d)(3), or the statutory provision authorizing *"equitable relief" for the benefit of investors*, 15 U.S.C. § 78u(d)(5).[4] None uses the term "disgorgement." The statutory authorization to order civil penalties reads, in relevant part:

> [T]he Commission may bring an action in a United States district court to seek, and the court shall have jurisdiction to impose, upon a proper showing, a civil penalty to be paid by the person who committed such violation.
>
> (B) Amount of penalty. – . . . .
>
> (iii) Third tier.– . . . the amount of the penalty for each such violation shall not exceed the greater of (I) $100,000 for a natural person or $500,000 for any other person, or (II) the gross amount of pecuniary gain to such defendant as a result of the violation . . . .

4. To be sure, there are other statutory provisions that provide for limited, specific forms of monetary relief not relevant here, such as the so-called "clawbacks" of executive compensation from individuals when public companies restate financial results. *See, e.g.*, 15 U.S.C. § 7243 (2012) ("Forfeiture of Certain Bonuses and Profits").

Exchange Act of 1934 § 21(d)(3), 15 U.S.C. § 78u(d)(3).[5]

Section 305 of the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley") added the provision that allows obtaining additional monetary relief in the form of "equitable relief." This provision, added to the Securities Exchange Act of 1934, states:

> Equitable Relief.—In any action or proceeding brought or instituted by the Commission under any provision of the securities laws, the Commission may seek, and any Federal court may grant, any equitable relief that may be appropriate or necessary for the benefit of investors.

15 U.S.C. § 78u(d)(5). Prior to Sarbanes-Oxley there was no explicit provision for equitable monetary relief in the securities laws, so federal courts implied the equitable power to order monetary relief, variously styled "restitution" or "disgorgement," for violations of the securities laws. *See, e.g., SEC v. Tex. Gulf Sulphur Co.*, 446 F.2d 1301, 1307-08 (1971) (ordering defendants to pay "restitution" under Section 21(e) of the Exchange Act that allowed for injunctive relief and reasoning that the SEC may seek restitution without express statutory authority "as an ancillary remedy in the exercise of the courts' general equity powers to afford complete relief"). *See generally* Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, Harv. Bus. L. Rev. Online, Nov. 2013, at 2-3, http://www.hblr.org/2013/11/the-equity-facade-of-sec-disgorgement/ [hereinafter "*The Equity Façade*"]

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5. *See supra* note 3.

("Congress has never explicitly included disgorgement among the remedies the SEC can seek in federal court. Despite this silence, the SEC has been seeking disgorgement for decades, and courts have been granting it for nearly as long. . . . Over time, courts came to accept as a truism the notion that disgorgement is inherently an ancillary equitable remedy.").

In other words, Sarbanes-Oxley codified the federal courts' ability to grant monetary relief, but subjected it to two important limitations: first, Congress used the phrase "equitable relief" to describe the power granted, which is a phrase with defined parameters; and second, the statute granted the power only where it "may be appropriate or necessary for the benefit of investors." 15 U.S.C. § 78u(d)(5). These statutory limitations are binding. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (holding that federal courts, being courts of "limited jurisdiction," "possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree" (citations omitted)). Thus, any "disgorgement" order under this provision must meet this Court's description of what constitutes "equitable relief" and it may not be obtained for the purpose of being paid over to the treasury.[6]

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6. In parallel, the SEC is specifically authorized by Congress to seek "accounting and disgorgement" in administrative proceedings. *Compare* 15 U.S.C. §§ 77h-1, 78u-2, 78u-3 (administrative proceeding remedies) *with* 15 U.S.C. §§ 77t, 78u, 78u-1 (federal court remedies). It is not clear that Congress could vest in the SEC the same equitable powers possessed by federal courts. *See Equity Façade, supra*, at 2-3 n.12, 11 ("By explicitly authorizing disgorgement as an administrative remedy, capable of being ordered by an independent executive branch agency carrying out its law enforcement functions,

Congress's addition of the "Fair Funds" provision, as part of Sarbanes-Oxley, further demonstrates that 15 U.S.C. § 78u(d)(5) is limited to equitable relief for the benefit of identifiable investor-victims. That provision states:

> If, in any judicial or administrative action brought by the Commission under the securities laws, the Commission obtains a civil penalty against any person for a violation of such laws, or such person agrees, in settlement of any such action, to such civil penalty, the amount of such civil penalty shall, on the motion or at the direction of the Commission, be added to and become part of a disgorgement fund or other fund established for the benefit of the victims of such violation.

Congress must have recognized that disgorgement is not invariably a remedy in equity. It seems highly doubtful that Congress would—or constitutionally could, consistent with separation of powers—bestow one of the core judicial powers of an Article III court of equity upon a law enforcement agency of the executive branch."). Alternatively, if the SEC has an equitable power of "accounting and disgorgement," it should be governed by established equity jurisprudence. It also appears that Congress intended disgorgement in administrative proceedings to be ordered only when there were specifically identified investors who suffered losses. 15 U.S.C. §§ 77-h1, 78u-2, 78u-3 ("The Commission is authorized to adopt rules, regulations, and orders concerning *payments to investors*, rates of interest, periods of accrual, and such other matters *as it deems appropriate to implement this subsection*." (emphasis added)). In any event, administrative disgorgement would also be a forfeiture within the meaning of Section 2462. *See* Brief of Petitioner at 12-22, *Kokesh v. SEC*, No. 16-529 (Feb. 24, 2017) [hereinafter "Petitioner Brief"]; *infra* III.

15 U.S.C. § 7246(a). The Fair Funds provision reflects a realization that courts need congressional authorization to hand over proceeds of fines and equitable relief to victims. *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 321 (1937) (holding that the Appropriations Clause "means simply that no money can be paid out of the Treasury unless it has been appropriated by an act of Congress" (citations omitted)). It, therefore, gives effect to the "for the benefit of investors" clause of the equitable relief authorization. This provision also reflects a realization that disgorgement of traced assets obtained as equitable relief under 15 U.S.C. § 78u(d)(5) may be less than what the victims have lost. In that case, a fine up to the amount of gross pecuniary gain by the defendant can be ordered and handed over to the victims. Reading "disgorgement" as unbounded by equity jurisprudence renders this Fair Funds provision redundant.

II. THIS COURT'S BINDING PRECEDENTS GOVERN HOW TO INTERPRET THE SEC'S "EQUITABLE RELIEF" STATUTE.

The phrase chosen by Congress—"equitable relief"—is one that has been carefully and clearly interpreted by this Court in multiple cases, most notably *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002) and *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999). Those precedents are binding here, and establish three things. First, that the term "equitable relief" is a term with limitations. Second, that labelling some requested relief "disgorgement" does not make it "equitable relief." Third, that for an order to turn over money or property to qualify as true "equitable relief," it must be an order to return "money or property

identified as belonging in good conscience to the plaintiff [that] could clearly be traced to particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 213. In other words, under this Court's precedents, disgorgement of specifically identified property or money traced to the wrongdoing is an equitable remedy. Disgorgement of non-traceable assets is an order to pay money damages; it is a legal remedy unavailable under 15 U.S.C. § 78u(d)(5), and thus only permitted as an order for "civil penalties" under the civil penalties provisions.

The leading case here is *Great-West*, which establishes the methodology for determining the character of a remedy, and defines the types of money- and property-related orders that qualify as "equitable relief." Great-West Life & Annuity Insurance Company sued a medical insurance policy beneficiary for reimbursement of covered medical expenses under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(3). *Great-West*, 534 U.S. at 208-09. Section 502(a)(3) authorizes civil actions "to obtain other appropriate equitable relief," among other things. *Id.* at 209 (quoting 29 U.S.C. § 1132(a)(3)). Great-West sought to recover from the defendant money that the defendant never held but that the defendant was contractually obligated to pay to Great-West. *Id.* at 207-08. Great-West claimed that the relief it sought was "restitution," which it characterized as a form of equitable relief. *Id.* at 212. The Court was, therefore, called upon to interpret a statutory provision containing almost the exact language as the "equitable relief" provision in the Exchange Act, 15 U.S.C. § 78u(d)(5). In fact, the Court specifically extended its interpretation of "equitable relief" to all statutes containing this language, noting that "the term 'equitable

relief' appears in 77 provisions of the United States Code" and that "Congress felt comfortable referring to equitable relief in [the ERISA] statute—as it has in many others—precisely because the basic contours of the term are well known." *Id.* at 216 & n.3.

The Court first observed that the use of this term, "equitable relief," denoted limitations on the power authorized by the statute. As the Court explained, "'[e]quitable' relief must mean *something* less than *all* relief." *Great-West*, 534 U.S. at 209 (quoting *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 258 n.8 (1993)) (emphasis in *Mertens*).

The Court then indicated that the nature of the remedy, not its label, controls the analysis as to whether the relief sought is equitable. *See id.* at 213 ("[W]hether [the sought remedy] is legal or equitable depends on the basis for the plaintiff's claim and the nature of the underlying remedies sought."). The Court then observed that "restitution" was a label that applied both to equitable and legal relief; restitution is not inherently equitable. *Id.* at 212-13 ("In the days of the divided bench, restitution was available in certain cases at law, and in certain others in equity." (citing 1 D. Dobbs, Law of Remedies § 1.2, at 11; § 4.1(1), at 556; § 4.1(3), at 564-65; §§ 4.2-4.3, at 570-624 (2d ed. 1993); 5 A. Corbin, Contracts § 1102, at 550 (1964)); *see also SEC v. Lipson*, 278 F.3d 656, 663 (7th Cir. 2002) (Posner, J.) (expressly stating that "restitution . . . is both a legal and an equitable remedy").

The Court then proceeded to analyze the particular relief requested by Great-West "under the rubric of restitution" to determine if it was, in substance, equitable

or legal relief. *Great-West*, 534 U.S. at 212-14. The Court explained that a remedy is equitable, as opposed to legal, when the nature of the underlying claim refers to "those categories of relief that were *typically* available in equity." *Id.* at 210 (quoting *Mertens*, 508 U.S. at 256) (emphasis in *Mertens*). *Great-West* explained further that, traditionally, equitable relief has taken the form of "transfer[ring] title (in the case of the constructive trust) or [giving] a security interest (in the case of the equitable lien) to a plaintiff who was, in the eyes of equity, the true owner," and that these traditional forms must guide courts in issuing equitable remedies. *Id.* at 213. In contrast, a remedy is at law "'where the property sought to be recovered or its proceeds have been dissipated so that no product remains, the plaintiff's claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust of or an equitable lien upon other property of the defendant.'" *Id.* at 213-14 (brackets omitted) (quoting Restatement (First) of Restitution, § 215, Comment (a) (1936)).

Using this analysis, the Court determined that Great-West's claim for "restitution," at its core, was not equitable, but legal, because "the funds to which petitioners claim[ed] . . . an entitlement . . . [were] not in respondents' possession." *Id.* at 225-26. Great-West was not seeking to recover specific traced funds that the insurance beneficiary had obtained, but reimbursement as the fulfillment of a contractual obligation to pay money. *Id.* at 210-12. Put another way, Great-West's claim for restitution was determined to be "at law" because it had the actual result of imposing "personal liability for the benefits that [it] conferred upon respondents," which does not sound in equity but at law. *Id.* at 213-14 (explaining that an order imposing "a merely personal liability upon the

defendant to pay a sum of money . . . [is] essentially [an] action[] at law" (citing Restatement (First) of Restitution, § 160, Comment (a) (1936)).

Accordingly, pursuant to *Great-West*, in order for courts to provide equitable relief in the form of an order to turn over funds or property, the funds or title to property sought must be specifically identified and directly traced as the proceeds of wrongdoing. *Id.* at 213; *see also Sereboff v. Mid Atlantic Med. Servs., Inc.*, 547 U.S. 356, 364-65 (2006) (finding that "strict tracing rules" were applied to equitable restitution historically, such that the right to recover restitution only existed where the proceeds sought were in the defendant's possession).

Great-West is not a unique example of this Court's rigorous application of the limits created by equity jurisprudence. In *Grupo Mexicano*, this Court was presented with "the question whether, in an action for money damages, a United States District Court ha[d] the power to issue a preliminary injunction preventing the defendant from transferring assets in which no lien or equitable interest [was] claimed." *Grupo Mexicano*, 527 U.S. at 310. The Court found that a district court had no such power because such power does not conform to established principles of "equity." *Id.* at 321-27. The Court explained first that "the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence. Even when sitting as a court in equity, we have no authority to craft a 'nuclear weapon' of the law like the one advocated here." *Id.* at 332. Relying on "traditional principles of equity," the Court concluded "that the expansive view of equity must be rejected." *Id.* at 319-

21; *see also Great-West*, 534 U.S. at 209 ("'[E]quitable relief' must mean *something* less than *all* relief." (quoting *Mertens*, 508 U.S. at 251) (emphasis in *Mertens*)). Instead, the Court emphasized that the boundaries of traditional equitable relief must restrain courts, as "Congress is in a much better position . . . to perceive . . . and to design appropriate remed[ies]." *Grupo Mexicano*, 527 U.S. at 322 ("To accord a type of relief that has never been available before—and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent—is to invoke a default rule not of flexibility but of omnipotence." (citation omitted)). The Court held, therefore, that "[b]ecause such a remedy was historically unavailable from a court of equity . . . the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages." *Id.* at 333.

In short, this Court's precedents demonstrate that calling "disgorgement" an equitable remedy does not it make it so. There are times when it is—when the disgorged funds are specifically traced.[7] Other times, it plainly is not: it is a legal remedy, a judgment for a sum of money that is to be paid from whatever assets the defendant may possess without regard to their provenance. *See The Equity Façade*, *supra*, at 6-8. Nonetheless, the SEC and many lower courts incorrectly and without analysis adopted as a truism that disgorgement claims are "equitable." *Id.*

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7. As noted above the statute also requires that any equitable relief be "for the benefit of investors," 15 U.S.C. § 78u(d)(5), which means that the traced assets must be returnable to their rightful owner.

at 3. Petitioners explain in detail that the SEC's use of disgorgement is completely unmoored from the limiting principles of equitable relief enunciated in *Great-West*. Petitioner Brief at 49-62. Once one views the SEC's claim for disgorgement through the analytical prism of *Great-West*, it is clear that the SEC is actually seeking civil penalties under the guise of disgorgement because it makes little, if any, effort to tie the relief ordered to the wrongfully obtained "particular funds or property in the defendant's possession." *Great-West*, 534 U.S. at 213.

Indeed, this incorrect equating of disgorgement with equity, combined with a failure of lower courts to apply either the established limitations on equity or the statutory limits on civil penalties, have resulted in the SEC requesting, and courts granting, powers "not of flexibility but of omnipotence." *See Grupo Mexicano*, 527 U.S. at 322. For example, one court has ordered a defendant to "disgorge" untraced funds that were never "received or controlled" by the defendant, but rather were received by innocent third parties, *see SEC v. Contorinis*, 743 F.3d 296, 310 (2d Cir. 2014), which is precisely the type of non-equitable remedy rejected by *Great-West*. Here too, the Petitioner has been ordered to disgorge funds he never possessed. *SEC v. Kokesh*, 834 F.3d 1158, 1161-62 (10th Cir. 2016), *cert. granted*, No. 16-529, __ S. Ct. __ (2017). The attraction to the SEC of this unlimited "disgorgement" power likely explains the fact that disgorgement orders now often dwarf civil penalty orders.[8]

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8. Indeed, the SEC has secured as much as $3.019 billion in aggregate disgorgement orders in one fiscal year, and has secured at least $2 billion in aggregate disgorgement orders in each of the last five years—far exceeding the amount of aggregate civil penalties in the same period. *See The Equity Façade*, *supra*, at 1; Sec. &

In sum, this Court's precedents affirm that where the SEC's request for disgorgement is tied to specifically identified, wrongfully obtained money or property, then it is *equitable* and can be ordered under 15 U.S.C. § 78u(d)(5). But where the SEC's request for "disgorgement" is unconnected to specific, wrongfully obtained money or property, then it is in reality just a claim for a money judgment and, therefore, a request for civil penalties authorized by 15 U.S.C. § 78u(d)(3) and other civil penalties provisions. A proper analysis of the substance of the relief requested under the rubric of "disgorgement" simplifies the analysis of the statute of limitations question

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Exchange Comm'n, Select SEC and Market Data Fiscal 2016, 2 tbl. 1 (2016), https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2016.pdf ($2.8 billion in disgorgement and $1.3 billion in penalties); Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2015, 2 tbl. 1 (2015), https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2015.pdf ($3.0 billion in disgorgement and $1.2 billion in penalties); Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2014, 2 tbl. 1 (2014), https://www.sec.gov/reportspubs/select-sec-and-market-data/secstats2014.pdf ($2.8 billion in disgorgement and $1.4 billion in penalties); Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2013, 2 tbl. 1 (2013), https://www.sec.gov/about/secstats2013.pdf ($2.3 billion in disgorgement and $1.2 billion in penalties); Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2012, 2 tbl. 1 (2012), https://www.sec.gov/about/secstats2012.pdf ($2.1 billion in disgorgement and $1 billion in penalties); Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2011, 2 tbl. 1 (2011), https://www.sec.gov/about/secstats2011.pdf ($1.9 billion in disgorgement and $928 million in penalties); Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2010, 2 tbl. 1 (2010), https://www.sec.gov/about/secstats2010.pdf ($1.8 billion in disgorgement and $1 billion in penalties); Sec. & Exchange Comm'n, Select SEC and Market Data Fiscal 2009, 2 tbl. 1 (2009), https://www.sec.gov/about/secstats2009.pdf ($2.1 billion in disgorgement and $345 million in penalties).

presented here, as well as other disputed questions of securities enforcement law.

III. APPLICATION OF SECTION 2462'S LIMITATIONS PERIOD DEPENDS ON THE TRUE CHARACTER OF RELIEF REQUESTED.

Based on this Court's precedents and the applicable statutory language, this Court should separately analyze whether Section 2462's statute of limitations applies, on the one hand, to "civil penalties" under 15 U.S.C. § 78u(d)(3), and on the other hand, to "equitable relief" "for the benefit of investors" under 15 U.S.C. § 78u(d)(5).

Where the SEC seeks disgorgement that is, in truth, a civil penalty, the analysis is simple—all of the statutory and constitutional restrictions on civil penalties apply, including the statute of limitations. It is uncontested and, indeed, is no revelation that Section 2462's statute of limitations applies to civil penalties. In fact, it is in the words of the statute itself:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of *any* civil fine, *penalty*, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462 (emphasis added). *Great-West* and *Grupo Mexicano* show that this restriction on civil penalties

cannot be ignored just because the relief is labeled disgorgement if the relief, in substance, is a civil penalty. The statute of limitations serves a purpose. *See Gabelli v. SEC*, 133 S. Ct. 1216, 1220-21 (2013) (holding that the statute of limitations is considered "vital to the welfare of society" and quoting prior opinions, including one by Chief Justice Marshall, in saying it "'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time'" (first quoting *Wood v. Carpenter*, 101 U.S. 135, 139 (1879), then quoting *Adams v. Woods*, 2 Cranch 336, 342 (1805)).

The analysis of true "equitable relief" is less straightforward, but as the Petitioners point out, equitable disgorgement fits comfortably within Section 2462's reference to "forfeiture." Petitioner Brief at 12-22. Indeed, the Tenth Circuit said as much when it defined civil forfeiture in the context of § 2462 "as [a]n *in rem proceeding* brought by the government against property that either facilitated a crime *or was acquired as a result of criminal activity*." *Kokesh*, 834 F.3d at 1165-166 (emphasis added) (quoting Black's Law Dictionary); *see also SEC v. Graham*, 823 F.3d 1357, 1363 (11th Cir. 2016) (concluding that, according to its ordinary meaning, forfeiture "occurs when a person is forced to turn over money or property because of a crime or wrongdoing"). As discussed above, "equitable relief" is only available under 15 U.S.C. § 78u(d)(5) when specific, identified property is being returned to its rightful owner, the investor; it therefore is an *in rem* proceeding, *i.e.*, a proceeding in which the true ownership of the property is determined. *See Cont'l Grain Co. v. The FBL-585*, 364 U.S. 19, 26-27 (1960) (granting joinder of an *in rem* proceeding against property and an action against the owner of that property because "while two methods

were invoked to bring the owner into court and enforce any judgment against it, the substance of what had to be done to adjudicate the rights of the parties was not different at all"); *Pennoyer v. Neff*, 95 U.S. 714, 734 (1877) ("It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the title of individual claimants; but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein."); *Tooele Cty. v. United States*, 820 F.3d 1183, 1188 (10th Cir. 2016) ("[I]n rem proceedings affect the interests of all persons in the property."); *United States v. Sum of $70,990,605*, 991 F. Supp. 2d 144, 149-50 (D.D.C. 2013) (finding that a court, while exercising its jurisdiction in an *in rem* action "may adjudicate claims of ownership"). It is also self-evident that any "equitable relief" under 15 U.S.C. § 78u(d)(5) could be authorized only because the subject property was acquired in violation of law. "Equitable relief" under 15 U.S.C. § 78u(d)(5) is, thus, a civil forfeiture, subject to the explicit application of 28 U.S.C. § 2462.

Even if this Court decided that equitable disgorgement of traced assets is not subject to Section 2462's statute of limitations, other limitations apply. For example, the equitable defense of laches applies, especially when the government is standing in the place of the investor in order to seek recompense. *See* Petitioner Brief at 56-61. Moreover, the character of the relief itself would extinguish stale claims as a matter of fact because, as time passes, the prospect that a defendant still holds tainted property steeply diminishes. Furthermore, as a matter of proof, the passage of time diminishes the likelihood

that the SEC (or a plaintiff) can collect and preserve the evidence needed to carry its burden to trace ill-gotten assets.

Other questions, beyond the application of Section 2462's statute of limitations, are also informed by a proper regard for the controlling statutory language and this Court's analysis of the phrase "equitable relief." For example:

- **Prejudgment interest cannot be ordered on equitable remedies.** Properly applied, equity jurisprudence does not permit an order of prejudgment interest on "disgorgement" in the manner routinely requested by the SEC. This is because, applying *Great-West*, the SEC is only statutorily empowered to seek any interest actually earned on the particular funds or property wrongfully obtained in the defendant's possession. *See Great-West*, 534 U.S. at 213-14 & n.2 ("There is a limited exception for an accounting for profits, a form of equitable restitution that is not at issue in this case. If, for example, a plaintiff is entitled to a constructive trust on particular property held by the defendant, he may also recover profits produced by the defendant's use of that property, even if he cannot identify a particular res containing the profits sought to be recovered."). In fact, to the extent there is any reduction in the value of the traced asset or dissipation of traceable funds, the remainder is all that is properly recoverable in equity. *See id.* at 213. The addition of "prejudgment interest" in federal district court enforcement actions does not have a statutory basis or a basis

in equity jurisprudence; it is yet another form of civil penalty.

- **Any disgorgement amount that is not equitable must be considered when calculating the maximum penalty amount under 15 U.S.C. § 78u(d)(3)(B)(iii).** Enforcement actions in federal district court are subject to a maximum penalty of "the gross amount of pecuniary gain to [the] defendant as a result of the violation . . . ." 15 U.S.C. § 78u(d)(3)(B)(iii). Because disgorgement ordered in excess of equity is a civil penalty and because there is no other statutory penalty authority, any amount that is disgorged must be added to the calculation of the maximum penalty amount, unless the disgorgement relates to the return of specifically identified assets to their rightful owners. Otherwise, the SEC is impermissibly circumventing the statutory maximums.

- **Joint and several liability is an improper scheme of recovery for equitable disgorgement orders.** Joint and several liability is nonsensical when applied to orders for equitable disgorgement because while joint and several liability attaches to an individual, as a personal liability, with the prospect that that individual or individuals will pay the whole amount of monetary damages owed, *see* D. Dobbs, The Law of Torts § 487 (2d ed. 2016), equitable disgorgement is an *in rem* remedy that is tied to a specific right in property. *Great-West*, 534 U.S. at 213-14. The recovery scheme cannot be "*in rem*" if one is seeking it either from one person or multiple people, *i.e.*, the concept of joint

and several liability is fundamentally inconsistent with equitable relief, which relates to specifically identified property.

- **Prejudgment asset freeze orders based on the federal court's inherent equitable power have to be limited to true equitable relief.** The lower courts—without analyzing whether remedies sought are legal or equitable—have ordered that most, it not all, of the defendant's assets be frozen prejudgment pursuant to their inherent equitable injunctive powers. The SEC has convinced the lower courts to freeze (i) the gross pecuniary gain, labeled as "disgorgement," (ii) "prejudgment interest," and (iii) the amount of the gross pecuniary gain again, labeled this time as "civil penalties." But in so doing, these lower courts have run afoul of this Court's holding in *Grupo Mexicano*. In *Grupo Mexicano*, this Court held that a lower court could not order an injunction freezing a defendant's assets based on a prejudgment contract claim for money damages because such relief was not traditionally granted by courts of equity. *Grupo Mexicano*, 527 U.S. at 319, 327, 333 (holding that "the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages"); *see United States v. Oncology Assocs.*, 198 F.3d 489, 496 (4th Cir. 1999) (interpreting *Grupo Mexicano* to hold that "general equitable authority does not authorize prejudgment injunctions in actions at law"). Therefore, prior to a defendant's assets

being frozen, the government's interest in those assets must be cognizable—equitable, and thus traceable.

- **Relaxed burdens of proof are not "equitable."** Although lower courts have, at times, relaxed the burden of proving "disgorgement" on the (incorrect) view that "disgorgement" is always "equitable," *see The Equity Façade*, *supra*, at 4-5, this relaxation is not grounded in equity jurisprudence. Rather, equity jurisprudence provides that the claimant, here the SEC, bears the burden of proving the specifically identified property to be equitably disgorged. *See* Restatement (First) of Restitution, § 215, Comment (a) (1936) ("The claimant must prove not only that the wrongdoer once had property legally or equitably belonging to him, but that he still holds the property or property which is in whole or in part its product."); *id.* comment (b) ("Burden of proof. A person whose property is wrongfully taken by another is not entitled to priority over other creditors unless he proves that the wrongdoer not only once had the property or its proceeds, but still has the property or its proceeds or property in which the claimant's property or its proceeds have been mingled indistinguishably."); *see also Great-West*, 534 U.S. at 217 ("Rarely will there be need for any more 'antiquarian inquiry' than consulting, as we have done, standard current works such as Dobbs, Palmer, Corbin, and the Restatements, which make the answer clear." (citation omitted)); Restatement (Third) of Restitution, § 58, Comment (a) (2011) (restatement adopted after Sarbanes-Oxley and *Great-West*;

noting that "[t]he common requirement of any claim to asset-based restitution, although differently phrased in the context of each remedy, is that the claimant identify specific property in the hands of the recipient in which the claimant asserts rights of ownership or security").

CONCLUSION

For the foregoing reasons, the Court should resolve the question presented by determining first whether the remedy being sought by the SEC under the rubric of "disgorgement" is, in substance, a penalty or "equitable relief." If the disgorgement at issue here represents legal relief, it is clearly time barred. If the disgorgement at issue here represents "equitable relief," it is also time barred because it is forfeiture within the meaning of the statute of limitations. Alternatively, if the Court finds that the disgorgement at issue here is not forfeiture, all other limitations attendant to prosecuting equity claims should apply, including, among other things, tracing and laches.

Respectfully submitted,

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